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No. 88-747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALLIED CORPORATION,

Petitioner,

—v.—

UNITED STATES INTERNATIONAL TRADE COMMISSION,

Respondent,

—and—

HITACHI METALS, LTD., ET AL., VACUUMSCHMELZE GmbH, NIPPON STEEL CORPORATION, ET AL., and SIEMENS CAPITAL CORP.,

Respondents.

RESPONDENT NIPPON STEEL CORPORATION ET AL.'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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December 2, 1988

STATEMENT PURSUANT TO RULE 28.1

Nippon Steel Corporation and Nippon Steel U.S.A., Inc. were Respondents below.

Nippon Steel Corporation has no parent company. Nippon Steel Corporation is the parent of Nippon Steel U.S.A., Inc.

Nippon Steel U.S.A., Inc. has no subsidiaries or affiliates.

Nippon Steel Corporation's subsidiaries (except wholly owned subsidiaries) and affiliates are Nippon Steel Chemical Co., Ltd.; Nichia Steel Works Ltd.; Suzuki Metal Industry Co., Ltd.; Daido Steel Sheet Corporation; Sanko Metal Industrial Co., Ltd.; Harima Refractories Co., Ltd.; Kurosaki Refractories Co., Ltd.; Nippon Tetrapod Co., Ltd.; and Taihei Kogyo Co., Ltd.

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STATEMENT OF THE CASE

On May 14, 1984, in ITC Investigation No. 337-TA-143, the Administrative Law Judge ("ALJ") issued an Initial Determination ("ID") which, in part, construed the claims of U.S. Patent No. 4,221,257 ("the '257 patent") and found the claims of the '257 patent so construed to be valid and infringed by the respondents. Respondents petitioned the International Trade

Commission ("ITC") to review the ID's claim construction. Petitioner Allied Corporation, on the other hand, affirmatively took the position before the ITC that the ID's claim construction was correct and that no review of this issue by the ITC was necessary. Petitioner Allied Corporation's 1984 positions before the ITC on the issue of review are set forth in the CAFC's opinion below[1] at pages A-5,6 (page numbers used herein are those of Petitioner Allied's Appendix) and are also set forth in the ITC's opinion below at page A-33, footnote 35.

Example of positions taken by Allied before the ITC in 1984 and set forth in the CAFC's opinion below at pages A-5,6 include:

> The ALJ found the word "nozzle" to be ambiguous and used the patent specification to *construe* this word to include "wide lips." The fault is not with the decision of the ALJ, but with the obvious mischaracterization of that holding by Respondents. No review of this issue is necessary. (Emphasis in original).

Allied went so far as to urge that the ALJ *correctly* construed "nozzle" to include the wide lips limitation.

> [T]he ALJ has correctly found that "[t]he '257 claims are construed as including the critical feature of the wide lips on the nozzle." The ALJ did not read Dr. Narasimhan's melt contraint or support theory into the '257 process claims.

The ITC declined to review the ID and, thus, on July 6, 1984, the ID became the Final Determination of the Commission. 19 C.F.R. § 210.53(h). The ITC subsequently issued a General Exclusion Order to implement the Final Determination.

In 1985, respondents Hitachi Metals, Ltd. ("HML") and Vacuumschmelze GmbH ("VAC") filed motions in the ITC

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1 The opinion of the CAFC below is reported at 850 F.2d 1573 and is reproduced in Petitioner Allied Corporation's Appendix pp. A-1 to A-22. Excerpts of the opinion of the ITC below are reproduced in Petitioner Allied Corporation's Appendix pp. A-23 to A-35.

under 19 C.F.R. § 211.54(b) for an Advisory Opinion that new processes that they had developed did not infringe the claims of the '257 patent as construed by the ITC in 1984. The ITC granted these motions, instituted Advisory Opinion proceedings, and, *sua sponte*, the ITC initiated exclusion order modification proceedings. 19 C.F.R. § 211.57.

In the 1985-87 advisory opinion and exclusion order modification proceedings, Petitioner Allied Corporation agreed that patent claim construction and validity issues with respect to the '257 patent would not be relitigated, and the ITC in its opinion below so found (A-7, A-33). The CAFC affirmed the ITC's 1987 Determination of non-infringement (A-18) with the CAFC expressly finding that the 1984 and 1987 claim constructions were the same (A-17).

Under 19 C.F.R. § 210.54(a)(1)(ii),(iii),(iv) and (a)(2), the CAFC found that in 1984 Allied abandoned its right to review of the construction of the '257 patent claims, with the CAFC pointing out that "Allied did far more than fail to argue; it *affirmatively stated* that the ALJ's construction was correct." (A-16,17, emphasis added).

Allied Corporation's Petition, in essence, seeks review of the CAFC's finding that in 1984, Allied abandoned the right of appellate review of the '257 patent claim construction.

ARGUMENT

Respondent Nippon Steel Corporation respectfully submits that Petitioner Allied Corporation's petition for a writ of certiorari should be denied.

A. Allied Mischaracterizes The Case

Allied's petition is replete with references to 1984 claim constructions, 1987 claim constructions, various alleged "reconstructions" of the claims, and requests that Allied be given the right of review of the 1987 patent claim construction. Basically, the petition assumes that there is a "1987 claim construction" which is different than the "1984 claim construction". For

example, Allied states at page 7 of its petition "Allied was seeking appellate review of the 1987 ITC claim construction."

This is a flagrant mischaracterization of the case below. Allied fails to advise this Court that the CAFC expressly found that the 1984 and 1987 claim constructions are the *same*. (A-17). The CAFC further characterized Petitioner Allied's contention that the 1987 claim construction was different than the 1984 claim construction as "disingenuous". (A-17). Ignoring the CAFC's findings, Allied presents its position on claim construction to this Court as if it were a given basic fact in these proceedings. Thus, Allied's petition is fundamentally flawed, since it is based upon premises the CAFC expressly found not to exist and, indeed, to be "disingenuous".

B. The CAFC Correctly Construed 19 C.F.R. § 210.54(a)

The CAFC found that petitioner Allied abandoned its right to appellate review of the 1984 patent claim construction by *affirmatively* taking the position before the ITC that the ALJ's claim construction in the 1984 ID was correct. Abandonment of the right to appeal the 1984 patent claim construction was found pursuant to the authority of 19 C.F.R. § 210.54(a)(1)(ii), (iii), (iv) and (a)(2). Citation was made to *Lizut v. Department of the Army*, 717 F.2d 1391 (Fed. Cir. 1983).

The *Lizut* case involved a factual and procedural context very similar to the present case. In *Lizut*, the petitioner endorsed the Presiding Official's decision below to the full Board. The CAFC found that the petitioner could not reverse positions on appeal to the CAFC with respect to issues that the petitioner had previously endorsed before the Board and which the Board adopted. (717 F.2d at 1395-6).

The cases cited by Allied are inapposite. *Safir v. Kreps*, 551 F.2d 447, 452 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 820 (1977); *Center For Auto Safety v. Thomas*, 806 F.2d 1071, 1076 (D.C. Cir. 1986) *vacated* 810 F.2d 302 (D.C. Cir. 1987) (per curiam) (en banc), *reinstated* 847 F.2d 843 (D.C. Cir. 1988) (per curiam) (en banc); *Natural Resources Defense Council v. U.S.E.P.A.*, 824 F.2d 1146, 1151 (D.C. Cir. 1987); *Buckeye*

Cablevision, Inc. v. United States, 438 F.2d 948, 951 (6th Cir. 1971); and *Local 512, Warehouse and Office Workers' v. N.L.R.B.*, 795 F.2d 705, 714 (9th Cir. 1986) all involve situations where the party seeking appellate review failed to raise an issue before an agency or commission for review but another party raised the same issue before the agency or commission for its review. None of these cited cases deal with the facts of the present case, where Allied *affirmatively* took the position before the ITC that no review of the 1984 patent claim construction by the ITC was necessary, and the ITC adopted Petitioner Allied's position. The cases cited by Allied did not involve a situation where a party took an affirmative position before an agency or commission, the agency or commission adopted this affirmative position, and then the same party attemped to reverse on appeal the position adopted at its urging by the agency or commission. Petitioner Allied's contentions that the CAFC erred in finding abandonment pursuant to 19 C.F.R. § 210.54(a)(1)(ii)(iii)(iv) and (a)(2) are without merit.

C. There Is No Conflict With Other Circuits

Allied's contention that the CAFC's finding of abandonment under 19 C.F.R. §§ 210.54(a)(1)(ii)(iii)(iv) and (a)(2) is in conflict with other circuits is without merit. The authority cited by the CAFC, 19 C.F.R. § 210.54, only applies to 19 U.S.C. § 1337 Investigations conducted by the ITC. Only the CAFC can hear appeals from ITC investigations under 19 U.S.C. § 1337. See 28 U.S.C. § 1295(a)(6) and 19 U.S.C. § 1337 (c). Thus there is no conflict among the circuits in the construction of 19 C.F.R. § 210.54.

Furthermore, as discussed above, the cases cited by Allied purporting to proclaim different law in other circuits involved vastly different factual and procedural contexts.

D. Allied Was Not Denied Due Process

The CAFC found that Allied abandoned its right to appeal pursuant to the authority of 19 C.F.R. §§ 210.54(a)(1)(ii)(iii)(iv) and (a)(2). The CAFC's finding is based upon affirm-

ative positions taken by Allied, is in accord with the law promulgated in the Code of Federal Regulations, is supported by prior case law, and is not in conflict with the law promulgated by any case cited by Allied. Allied was not denied its "right to be heard." Indeed, the ITC adopted the claim construction advocated by Allied in 1984. There is no basis for Allied's contention that it was denied due process of law.

CONCLUSION

Petitioner Allied Corporation fails to raise any issue deserving this Court's consideration. Therefore, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

December 2, 1988

Respectfully submitted

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